the "congressional denial of power to the FCC" in § 2(b), Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986), there must be a "straightforward" and "unambiguous" assignment of authority. id. at 377. But there is no such delegation of authority to the FCC over pricing.[2]

B. The FCC Short-Circuited the Fact-Specific Price-Setting Mechanism Called For By the Act and Produced Arbitrary and Capricious Results.

The FCC cannot credibly dispute the fact that by setting proxy prices in an abbreviated rulemaking, it has hopelessly derailed the case-specific, evidentiary process Congress established for setting prices under the Act. At best, the FCC provides a two-step defense that seeks to obscure the real effect of its proxies. First, the FCC claims that the proxies do not displace the process called for in the Act, since the First Report and Order "encourage[s]" States to review actual cost studies. See FCC Opp. at 33. But whatever the text of the order may superficially recommend, the practical impact of the proxies on arbitrations is another matter. And as a practical matter, the FCC's rules have short-circuited the case-specific consideration built into the Act by effectively forcing States to

[2] The only provisions cited by the FCC do not even remotely imply a grant of authority over pricing. The FCC points to §§ 251(d)(3), 261(c) and 253. See FCC Opp. at 24-27. Section 251(d)(3), however, explicitly limits the FCC's powers. It states that the FCC "shall not" preclude enforcement of state rules that are "consistent with the requirements of this section" and that do not "substantially prevent" implementation of the section. From this the FCC would rely on a negative inference to derive a broad rulemaking authority that extends even to setting prices. Such a reading is fanciful. An express limitation on the FCC's authority cannot be twisted into a "straightforward" and "unambiguous" grant of power over pricing sufficient to overcome the restrictions in § 2(b). Section 261(c) similarly grants the FCC no authority, and instead merely notes that States may impose requirements on intrastate services that are not inconsistent with the Act and with FCC regulations under the Act. Merely by acknowledging that some FCC rules may address intrastate matters the section in no way implies a grant of authority over pricing. Finally, § 253 simply addresses the FCC's power to override provisions of state law that would erect "barriers to entry." Even if this section could be read to apply to pricing issues, which certainly are not included in its terms, it provides only a limited back-stop authority to rein in a State that has prevented entry into the local market. It clearly assumes that States will be implementing the Act in the first instance and provides that the FCC can only act with notice and comment after a particular state rule has been adopted. That is obviously a far cry from the power the FCC claims to preempt any State exercise of discretion by dictating rigid national pricing rules before the States have even acted.

apply the proxies immediately. Thus, States have already begun imposing the FCC's proxies in arbitrations. See infra p.11. To this, the FCC can offer no response whatsoever, and simply maintains -- in flat defiance of the facts -- that it is "entirely speculative" whether the proxy prices will ever be applied. See FCC Opp. at 37.

The FCC's second line of defense ultimately amounts to little more than a plea for leniency. See FCC Opp. at 33; see also AT&T Opp. at 33-34. The FCC effectively claims that, while the prices may not be based on studies that used its own pricing methodology, they are an interim solution and therefore close enough. But as the affidavits attached to GTE's motion and the submission of the Florida PSC make clear, the proxies most decidedly are not close enough to LECs' actual costs to satisfy either the statutory command that prices be based on "cost" or the standards of reasoned decisionmaking. To the contrary, they arbitrarily produce rates that drastically understate costs. As the Florida PSC has pointed out, the proxies set for Florida are "arbitrarily low," Florida PSC Mot. at 15, and given their method of calculation, the proxies generally "may bear no relationship to the actual cost[s]" of a LEC, id. Even if more lenient review might sometimes apply to a genuine stop-gap measure, that principle has no application here, where the FCC's so-called "interim solution" does not merely fill a gap, but rather displaces the individualized method for setting prices explicitly mandated by Congress.[3]

C. The FCC's Pricing Rules Violate the Terms of the Act.

Finally, in responding to GTE's argument that the FCC's pricing rules violate the Act because they would effect an unconstitutional taking, the FCC and others rely on an extravagantly overbroad

[3] The FCC is also wrong in asserting that, because GTE and others did not file a petition for reconsideration claiming that the proxy prices are arbitrary and capricious, these claims cannot be raised before this Court. See FCC Opp. at 33 (citing 47 U.S.C. § 405). The petition for stay before the FCC provided an adequate opportunity for the FCC to pass on these claims and thus preserved them for appeal. See Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1461 (D.C. Cir. 1996).

reading of Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989), and FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). Under this reading, because Duquesne and Hope focused on the "total effect" of a rate order in judging its constitutionality, the method used in setting the rate is simply irrelevant. Thus, the FCC contends that it cannot be determined yet whether its rules violate the Act, because the "end result" is not yet apparent,[4] and the method for setting prices cannot be challenged in itself.

The Court in Duquesne did say that it was the "impact" of a rate rather the "theory" behind it that was of primary importance. Duquesne, 488 U.S. at 310. But as Justice Scalia pointed out, by defining a constitutional standard that requires a regulated entity to be able to provide a fair return to investors, Duquesne and Hope necessarily imply that there is some constitutional minimum defining the investment base against which a return can be called "fair." See id. at 317 (Scalia, J., concurring). The issue in Duquesne, moreover, was whether a particular investment in a nuclear power plant had to be included in a rate base. The Court concluded that it did not, largely because the overall effect of excluding it was de minimis. See Duquesne, 488 U.S. at 311-12. That limited holding by no means suggests that an entire rate-setting mechanism can be constructed explicitly around the principle that all of a utility's actual, historical costs should be ignored.[5]

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[4] The FCC's effort to cast the issue in terms of ripeness is misplaced. GTE has not here raised a claim for compensation under the Fifth Amendment. Rather, GTE has argued that the Act cannot be construed to allow the FCC's pricing rules because, at a minimum, those rules raise a grave concern that they will effect an uncompensated taking. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 78 (1982) (interpreting statute to avoid construction that would raise "substantial doubt" that statute comported with the Fifth Amendment).

[5] Hope would not support such a rate mechanism either. In Hope, the question was whether rates had to be based on the present "fair value" of a utility's facilities, or if they could be based on the lower measure of value provided by historical costs. See 320 U.S. at 602. The Court held the use of historical costs permissible, since rates under that measure would still allow the utility to provide a return to investors and continue to attract capital. See id. at 602-05. Hope nowhere suggested, however, that a rate mechanism would meet the constitutional standard if it proceeded a further notch lower by gauging a return so as not to cover even a company's actual, historical costs.

The FCC's pricing mechanism, by ignoring actual costs, ensures that an incumbent LEC will not be able to meet the constitutional standard of providing a return to investors sufficient to continue attracting capital. Where a rate-setting method wholly departs in this fashion from the basic criterion used for measuring its constitutionality, there can be no serious claim that a court must "wait and see" to find out whether the rate impairs a company's financial integrity before declaring the mechanism inconsistent with a command that rates be "just and reasonable." The FCC's method plainly raises grave constitutional concerns and thus is not a reasonable interpretation of the Act. See, e.g., United States v. Security Industrial Bank, 459 U.S. 70, 78 (1982).[6]

II. GTE WILL SUFFER IRREPARABLE HARM ABSENT A STAY

After spending virtually its entire brief on the merits, the FCC makes practically no effort to respond to GTE's showing of irreparable harm. GTE's central points thus stand unrebutted.

First, the FCC's rules will irretrievably derail the negotiation and arbitration process created by Congress. On this point there can be no real debate. AT&T, for example, openly acknowledges that its negotiating strategy has been to hold out for nothing less than the rates "that would result from the methodologies adopted" by the FCC. AT&T Opp. at 46. Indeed, the very premise of the order is the FCC's belief that meaningful private negotiations -- the principal means Congress chose for achieving competition -- are actually impossible, due to a purported "disparity in bargaining power" FCC Opp. at 8. Thus, the express purpose of the FCC's rules is to "reduce delay and lower the transaction costs" of negotiations, id. at 13, by preordaining the "rights and obligations" of the negotiating parties, id. at 8. Unless those rules are stayed, their purpose will undoubtedly be realized,

[6] AT&T also erroneously suggests that the impact of the pricing rules can only be judged after taking into account LECs' revenues from unregulated aspects of their businesses. See AT&T Opp. at 24. Such extraneous revenues, however, cannot be counted in determining whether a rate mechanism is confiscatory. See, e.g., Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396, 399 (1920) (Holmes, J.); cf. Northern Pac. Ry. v. North Dakota, 236 U.S. 585, 596 (1915).

and all remaining opportunity for effective private negotiations under the 1996 Act will be irretrievably lost.[7]

Second, it is now also beyond doubt that the FCC's pricing rules -- and particularly its irrationally low proxy prices -- will peremptorily dictate the results of numerous arbitrations in the next few months, to the imminent detriment of GTE. Astonishingly, the FCC's sole response on this point is the persistent claim that this harm is "entirely speculative," id. at 38, because "'there is no certainty th[e] proxies will ever be applied.'" Id. at 37 (quoting FCC Stay Order ¶ 12). See also AT&T Opp. at 47-48. Apparently, the FCC is utterly oblivious to the real-world effects of its order. The fact is that, at the urging of AT&T and others, state commissions -- believing they have no practical choice -- have already begun imposing the proxies on GTE in arbitrations. In California, for example, an arbitrator ruled that beginning in November the proxies will apply to GTE on the ground that "the FCC orders are clear [that] . . . where it is not feasible to fully address new cost studies within the time constraints of the specific arbitration . . . we would rely on the proxies."[8]

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[7] Relying on a snippet of legislative history, the FCC and AT&T also suggest that the rules can do no harm because Congress purportedly intended the FCC's rules to govern outcomes in negotiations and arbitrations. See FCC Opp. at 38; AT&T Opp. at 44-47. That response rests on a logical fallacy since it assumes the validity of the rules. The FCC cannot deny harm by reasserting its view of the merits Rather, in assessing harm, the Court must assume that GTE's challenge will ultimately prevail. And plainly GTE will be irreparably harmed if unlawful pricing rules dictate the terms in the negotiating process. In any event, the timetable in the Act shows no design to give the FCC's rules the influence the FCC claims. Negotiations could start immediately after passage of the Act and arbitrations could proceed after less than five months, but the FCC's rules were not due even to be announced (much less take effect) until six months after enactment. See § 251(d)(1).

[8] In re Petition of AT&T Communications of Calif., Inc. for Arbitration, Hearing Tr. at 1-2 (Sept. 18, 1996). Similarly, the Oregon commission has ruled that in the arbitration between AT&T and U S WEST, "the arbitrator will rely on the proxy prices established by the FCC." In re Petition of AT&T of the Pac. N.W., Inc. for Arbitration, Arbitrator's Mem. (Pub. Utility Comm'n of Oregon, Sept. 12, 1996). Numerous other state commissions will undoubtedly feel compelled to give in to the FCC's mandatory proxy prices in the next few weeks.

When they are imposed by state arbitrators, the FCC's below-cost proxies will effectively subsidize competitors like AT&T. As GTE has demonstrated, the unavoidable outcome of this artificial subsidy will be to allow entrants to inflict permanent losses of market share and goodwill on GTE during the pendency of an appeal -- losses that cannot be attributed to the efficiency or competitiveness of the entrants. See Supplemental Affidavit of Dennis B. Trimble; Affidavit of Orville D. Fulp; Affidavit of Donald M. Perry. Yet the FCC and its supporters nowhere make any effort to rebut GTE's showing of the impact the FCC's prices will have. Instead, they attempt to dismiss GTE's arguments with the erroneous assertion that "mere economic loss" is not irreparable harm. See FCC Opp. at 36. But "economic loss" manifestly does constitute irreparable injury justifying a stay where, as here, the loss is unrecoverable. See, e.g., Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1227 (8th Cir. 1987); Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 473 (5th Cir. 1985).[9]

III. A STAY WILL NOT HARM OTHERS AND WILL PROMOTE THE PUBLIC INTEREST BECAUSE IT WILL PRESERVE THE STATUS QUO UNDER THE ACT AND ENSURE SPEEDY IMPLEMENTATION OF LOCAL COMPETITION.

To support its claims that a stay will disserve the public interest, the FCC asserts that "a 'stay' is a misnomer in this case, because it would not maintain the status quo." FCC Opp. at 3. That is nonsense. The status quo is the process Congress set in the Act: private negotiations, backed up by arbitrations in which the "State commission[s] shall . . . establish any rates for interconnection, services, or network elements." § 252(c)(2) (emphasis added). It is the FCC that is attempting to

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[9] AT&T claims that GTE's rates in California will later be "trued-up" on the basis of full-blown cost studies -- suggesting that GTE might someday recover through cost-based rates some of the loss caused by the proxies. AT&T Opp. at 32 n.30. But the California commission has ruled that any subsequent revisions to interim rates will be applied to arbitration agreements "on a forward basis" only, and will therefore not make GTE whole. Resolution ALJ-168, at 4 (Calif. Pub. Utilities Comm'n Sept. 20, 1996).

alter that statutory status quo by arrogating to itself the power to set rates. A stay, on the other hand, would not in any way disrupt the process of implementing competition, but rather would allow it to proceed unimpeded by the distortions caused by the FCC's unlawful pricing rules.

Even the FCC admits that a stay would not impede the statutory process of implementing competition, and concedes that "[a] stay of the Commission's rules would not prevent the arbitration proceedings from going forward." FCC Opp. at 3 (emphasis added). That is GTE's whole point: a stay in this case in no way prevents the speedy implementation of competition precisely in the manner specified by Congress -- through private negotiations with the state commissions, not the FCC, determining just and reasonable rates when the parties cannot agree.

Having expressly conceded that a stay would not prevent the negotiation and arbitration process from going forward, the FCC's assertions that any stay -- even a limited stay of its pricing rules -- would cripple the process can only be based on the remarkable assumption that only the FCC, but not the States, can ensure that the rates set in arbitrations will be "just and reasonable." The FCC makes its assumption explicit as it points out that "[n]othing would do more to inhibit competition" than allowing "unreasonable rates" and asserts for that reason alone that it is inconceivable that "the Commission should have no authority over those rates." FCC Opp. at 26. Even putting aside the controlling fact that Congress determined that "State commissions" should have the role of "establish[ing] any rates," § 252(c)(2); see also § 252(d)(1), there can be no justification for the FCC's condescending suggestion that, with a stay of its rules in place, the States will ignore the statutory requirement that rates be just and reasonable and based on cost. With the characteristic attitude of a federal bureaucracy, the FCC automatically assumes an "only-we-in-Washington-can-do-things-right" view of the world that is a direct affront to the competence of the States. Indeed, the FCC's alarmist claim that only its pricing rules can prevent States from sabotaging the transition to competition reveals precisely the thinking that prompted the FCC's power-grab over prices in the first place: regardless of the choices Congress made, the FCC cannot conceive that anyone other than itself will do something right in implementing the Act.

That view is false. The simple truth is that, if this Court grants a stay of all or part of the FCC's rules, the statutory process for implementing competition will continue unimpeded. Private parties will continue to negotiate, States will continue to conduct localized arbitrations, and States will, where necessary, determine "just and reasonable" rates under the standards of the Act.

Even if the FCC's rules are upheld, there will be no harm to others from a stay in the interim. It will be far easier for parties to conform any variations in arbitrated agreements to the FCC's rules if the rules are later upheld than it would be for parties to re-work agreements adopted under the rules if the rules are struck down. While the FCC would like to dismiss this fact as merely a "self-serving" prediction by GTE, see FCC Opp. at 39 n.35, it should be obvious that it would require little effort to bring diverse arbitrated agreements into line with uniform federal rules, especially since state commissions will already have ensured compliance with the requirements of §§ 251 and 252. On the other hand, after a system of agreements based on a uniform national mold is in place, it will be impossible to recreate the atmosphere of free negotiations that would have existed had the parties approached the bargaining table without the shadow cast by the FCC's presumptive terms. Parties with working agreements inevitably will have reduced incentives to incur the costs involved in renegotiation and certainly will not reopen discussions on the full range of issues that would be on the table were they starting from a blank slate. In short, truing up any local variations to federal standards would be vastly simpler than attempting to move from a system of uniform agreements to create, after the fact, a system of negotiation and arbitration that never existed in the first place.

Moreover, since GTE, the Iowa Utilities Board, the Florida PSC and others are likely to succeed in their challenge to the FCC's national pricing rules, it is plainly the absence of a stay that will delay the implementation of competition. With a stay, the road to competition is a quick three-step process: first, the parties attempt to negotiate agreements (a process that is already finished in many places); second, the States conduct localized case-specific arbitrations; and third and finally, disappointed parties to the arbitration can seek review under the Act in federal district court.

By contrast, if a stay is not granted and (as is likely) the FCC's pricing rules are later struck down, the road to competition is, at best, a cumbersome, much-delayed seven-step process that will likely take years. First, the parties will conclude the initial negotiations under the cloud of the FCC's rules. Second, the state commission will conduct arbitrations where AT&T and others will assert (as they already have) that the state commission is bound to apply the proxies. Third, the FCC purports to create an additional step, under which parties disappointed with a State's application of the FCC's rules can seek review in front of the FCC. See First Report and Order ¶¶ 124-29. Fourth, parties will use the statutory review process in district court. Then, fifth, when the FCC's pricing rules are invalidated -- even assuming that the effects of the rules could be undone -- parties will be entitled to a new round of negotiations without the cloud of the FCC's order skewing the process. Next, there will be, sixth, a new round of arbitrations where the States are free to exercise their own judgment; and seventh and finally, review of the new arbitrations in district court. By delaying the transition to competition, this burdensome process will obviously frustrate Congress's goals in the Act. Given this prospect, the choice before the Court should be clear -- a stay is clearly warranted.

CONCLUSION

For the foregoing reasons, this Court should stay the effectiveness of the First Report and Order or, at a minimum, the pricing provisions in the FCC's rules. See §§ 51.501-51.515, 51.601-51.611, 51.701-51.717. The Court should also expedite judicial review.

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Date: September 24, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GTE Service Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Midwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE West Coast Incorporated, Contel of California, Inc., Contel of Minnesota, Inc. and Contel of the South, Inc., Petitioners, v. Federal Communications Commission and United States of America, Respondents.	Case No. ______ (D.C. Circuit Case No. 96-1319) (Consolidated with Case No. 96-3321)

MOTION FOR STAY PENDING JUDICIAL REVIEW AND FOR EXPEDITED JUDICIAL REVIEW

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MOTION FOR STAY PENDING JUDICIAL REVIEW AND FOR EXPEDITED JUDICIAL REVIEW

GTE Service Corporation and its affiliated telephone operating companies (collectively, "GTE") respectfully request a stay of the Federal Communications Commission's First Report and Order,[1] and the rules promulgated thereunder, purporting to implement the local competition provisions of the Telecommunications Act of 1996 (the "Act").[2] In that Act, Congress carefully crafted a fast-track process to set the terms of local competition -- a nine-month process consisting of private negotiations backed up by particularized and localized arbitrations conducted by state public utility commissions. Six months after passage of the Act, the FCC has derailed Congress's plan by issuing a 700-page order that peremptorily dictates, on a nationwide basis, all material terms of entry into the local market. Those national terms not only violate the substantive requirements of the Act; they would also, if allowed to go into effect, destroy the negotiation and particularized arbitration process crafted by Congress. An immediate stay of the FCC's order before it becomes effective is essential to prevent the FCC's unlawful national rules from irretrievably disrupting the process established by Congress, to prevent other immediate and irreparable harm to GTE that will flow from enforcing rules that directly contravene the Act, and to avert a disastrous false start in the implementation of Congress's plan to promote competition in the local telecommunications industry.

INTRODUCTION

As the Federal Communications Commission (the "Commission" or "FCC") has recognized, the Telecommunications Act of 1996 "fundamentally changes telecommunications

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[1] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order").

[2] Pub. L. No. 104-104, 110 Stat. 56 (to be codified at 47 U.S.C. § 151 et seq.).

regulation." First Report and Order ¶ 1. By unleashing competition in the local telephone exchange, the Act mandates a sweeping transformation of the telecommunications industry. At the same time, the Act holds out the promise of what Congress characterized as a "pro-competitive, de-regulatory" framework for accomplishing that transformation. Joint Explanatory Statement of the Committee of the Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

The Act promotes its pro-competitive goals, in part, by imposing on incumbent local exchange carriers (incumbent "LECs"), such as petitioner GTE, several duties, including the duties (i) to allow other telecommunications carriers to interconnect with the incumbent LEC's network ("interconnection"); (ii) to provide carriers access to elements of the incumbent LEC's network on an unbundled basis ("access to network elements"); and (iii) to sell to other carriers at wholesale rates any telecommunications service that the incumbent LEC provides to retail customers ("services"). See generally § 251(c).[3]

To implement these "local competition provisions," Congress explicitly relied on a system of private negotiations between incumbent LECs and other carriers, backed up by binding arbitrations conducted by state public utility commissions. Thus, under the Act, incumbent LECs must "negotiate in good faith" to reach agreements allowing competitors to use their networks, see § 251(c)(1), and agreements reached by such negotiation are explicitly freed from many of the constraints of the Act, see § 252(a). If the parties cannot reach an agreement, the Act enlists state utility commissions to resolve outstanding issues in a binding arbitration. See § 252(b). The Act explicitly directs that, in such arbitrations, state commissions shall establish

[3] Citations to the Act are to sections as they will be codified in title 47 of the United States Code. Sections 251 and 252 are reproduced in the attached appendix at Tab A.

any rates on which the parties cannot agree. See § 252(c)(2). The system enacted by Congress thus ensures that where agreements are not left entirely to private parties, arbitrations will involve localized, case-specific decisionmaking. And, by giving the critical role in this process to state commissions, Congress preserved the States' role in regulating the local telephone exchange.

Before the First Report and Order, the system set up by Congress was proceeding apace. Incumbent LECs and other carriers began negotiations promptly after the Act was passed. Some reached agreements without arbitration, and others entered arbitrations in front of state commissions as Congress planned. In short, competition was being implemented in accordance with the Act's market-driven and state-supervised approach.

Then, however, the FCC forced its way into the process. In what can only be described as one of the most audacious power-grabs ever attempted by an administrative agency, the FCC abruptly derailed the process for implementing competition established by Congress. In its place, the FCC erected a 700-page monument to the prowess of the federal regulatory state -- a national code dictating virtually all of the terms and conditions state commissions must impose in arbitrations. In particular, the FCC imposed an inflexible national pricing regime. Under that regime, the FCC has dictated the costs States may and may not consider in setting prices and has prohibited States from even considering the actual, historical cost of an incumbent's network -- prudent investments made to meet state obligations. The FCC has even attempted to prohibit States from setting prices sufficient to cover the true prospective or "forward-looking" costs an incumbent faces in operating its own network, and has required that States instead calculate costs based on a nonexistent, hypothetically most efficient network. In addition, the FCC set specific "proxy" prices that are well below an incumbent LEC's true costs.

According to the FCC, the state commissions must impose these proxy prices in their arbitrations unless they first complete a review of cost studies conducted according to the FCC's terms, and even then the FCC would require the state commissions to justify any departure from those prices. The Commission's rules also purport to impose myriad other burdensome terms on competition, including restrictions prohibiting incumbent LECs from differentiating themselves from competitors and rules requiring LECs to upgrade and reconfigure their networks to accommodate competitors' requests.

The FCC euphemistically claims that its rules will "expedit[e] and simplif[y]" the negotiation and arbitration process. First Report and Order ¶ 56. That is true only in the sense that negotiations are speedier when all the terms have been set in advance. In reality, the FCC's national rules will effectively <u>halt</u> the process set up by Congress, and substitute for it the FCC's own national code for local competition. Indeed, when rumors of the impending First Report and Order first circulated, potential new entrants effectively broke off meaningful negotiations with incumbent LECs to await the anticipated windfall of the FCC's order.

Thus, it is already clear that the system of negotiations and localized arbitrations established by the Act ceases to work if the FCC can promulgate a presumptive set of terms -- and particularly pricing terms -- that skew negotiations from the start. Negotiating under the shadow of such rules, no party will agree to terms less favorable than those dictated by the FCC. In addition, by setting uniform, presumptive "proxy" prices in its abbreviated rulemaking, the FCC has completely circumvented the localized, case-specific evidentiary procedure for setting prices established by Congress and has usurped the role explicitly assigned by Congress to the States.

The damage done by the FCC's rules does not stop there, however. The rules will also have the perverse effect of discouraging true competition and promoting instead the forced conversion of incumbent LECs into simple wholesalers of local telephone service. Congress sought to promote true, facilities-based competition by encouraging the construction of rival networks to compete with incumbents. Thus, as the Conference Report accompanying the Act states, the Act "was designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." By setting prices for network elements and services far below costs, however, and by imposing other unlawful terms that encourage carriers to purchase and combine network elements from incumbents, the FCC's rules will thwart the development of facilities-based competition. Indeed, even the FCC recognizes that some of its rules granting competitors expansive access to incumbents' networks will "reduce [incumbents'] incentives to offer innovative services." First Report and Order ¶ 282. Instead, the rules will promote a world of "Potemkin competition," where so-called "competitors" merely repackage incumbents' network elements and services and market them as their own. The result will be, rather than rival local exchange networks, one continually degrading network. Incumbent LECs will have no incentive to invest money to upgrade their networks, and new carriers, given the benefit of bargain-basement prices for access to the existing network, will have no incentive to construct competing facilities. This is not the "procompetitive" system Congress envisioned; it is nothing more than an illusion of competition created by a systematic subsidy for competitors.

An immediate stay pending review by this Court is necessary to preserve the process specified by Congress for implementing local competition and to prevent the FCC's rules from irretrievably skewing the transformation of local telecommunications called for by the Act. As we demonstrate below, GTE readily satisfies the factors considered in granting a stay.

(1) Likelihood of Success on the Merits. While a host of infirmities with the Commission's rules can be raised at the merits stage of this case, in this motion for stay GTE focuses on the most glaring and immediately destructive of the Commission's rules -- the pricing provisions. The FCC's pricing rules are plainly unlawful for a number of reasons:

First, and most basically, the FCC exceeded its jurisdiction by promulgating national rules on pricing, since the Act expressly assigns the States authority over pricing terms in arbitrations.

Second, in attempting to impose national pricing rules and proxy prices, the FCC plainly violated the procedures specified by Congress for determining prices. In the state arbitration proceedings required under the Act, Congress established a localized, evidentiary procedure for determining just and reasonable prices "based on . . . cost." § 252(d)(1). See also § 252(d)(3) (prices for services must be based on retail rates less "costs that will be avoided"). The abbreviated rulemaking used by the FCC to determine categorical pricing rules and even specific proxy prices deprived incumbent LECs of the right, guaranteed by the 1996 Act, to demonstrate their true costs on a localized basis through the presentation of evidence. Not surprisingly, the FCC's attempt to substitute an abbreviated rulemaking for the process envisioned by Congress also resulted in arbitrary decisions and the imposition of prices that do not even accord with the FCC's own announced methodology for determining rates.

Third, even if the FCC had the authority to promulgate pricing standards in some form and had not utterly ignored the procedures called for by the Act, the pricing rule adopted by the FCC to govern interconnection and access to network elements is plainly unlawful. By prohibiting States from even considering an incumbent LEC's actual historical costs and by fixing prices that deny incumbents an opportunity to recover their true forward-looking costs, the First Report and Order both violates the plain language of the Act and interprets the Act in a manner that raises grave constitutional questions under the Takings Clause.

(2) Irreparable Injury. If allowed to take effect, the Commission's rules would cause immediate and irreparable harm to GTE and others in at least two ways . First, the First Report and Order will render meaningless the negotiation and arbitration process established by Congress. The Order's pricing rules, particularly its immediately effective proxy prices, remove any incentive for competing carriers to negotiate with incumbents over price. Second, by requiring States immediately to impose below-cost prices on incumbent LECs, the First Report and Order will cause GTE to suffer irremediable losses of customers, revenue and goodwill before this Court has the opportunity to pass on the validity of the FCC's actions.

(3). Lack of Harm to Others and the Public Interest. No significant harm would result from granting a stay because, under a stay, the transition to competition called for by the Act will continue moving forward without delay. Parties will negotiate agreements under the Act and the arbitration process (which has already begun in earnest) will continue unimpeded. In short, the competition that Congress wanted will continue, and in accordance with the process Congress chose.

The Commission's rules are scheduled to go into force on September 28, 1996. If they are allowed to take effect, they will irretrievably derail the process Congress established under the Act and, by triggering a false start in the transition to competition, will misshape the new local telecommunications industry for the foreseeable future. GTE therefore respectfully requests that this Court stay the First Report and Order in its entirety.[4] In the alternative, GTE requests that the Court, at a minimum, stay the pricing rules announced by the Commission since they are most plainly beyond the Commission's jurisdiction and will cause the most immediate harm.[5] Given the importance of the issues presented in this case to the restructuring of local telecommunications already under way under the Act, the Court should also grant expedited review.[6]

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[4] On August 28, 1996, GTE and the Southern New England Telephone Company ("SNET") filed a joint motion with the Commission seeking a stay of the First Report and Order pending judicial review. GTE and SNET informed the Commission that if it had not acted on the motion within 10 days, they would seek a stay from the Court of Appeals. To date, the Commission has not acted on that motion. On September 6, 1996, GTE filed a petition for review before the Court of Appeals for the District of Columbia Circuit. SNET filed a petition for review and a motion for stay before the same Court on September 10, 1996. Pursuant to a lottery system established by 28 U.S.C. § 2112, those petitions and 10 other petitions for review filed in various circuits have been consolidated before this Court along with the petition for review in Iowa Utilities Board v. FCC, No. 96-3321.

[5] Those provisions consist of the following sections of the Commission's rules: §§ 51.501-51.515, 51.601-51.611, 51.701-51.717.

[6] Expedited review to hasten the resolution of this case is warranted in addition to a stay. Therefore, GTE supports the motion for expedition filed by Bell Atlantic Corp., et al., and the briefing schedule proposed in that motion. See Motion for Expedited Consideration and for a Briefing Schedule, Bell Atlantic Corp. v. FCC, No. 96-1318 (D.C. Cir. Sept. 6, 1996). GTE requests that the briefs of petitioners, and any intervenors in support of them, should be due by October 14, 1996; that the briefs of respondents, and any intervenors in support of them, should be due by November 13, 1996; and that the reply briefs of petitioners should be due by November 27, 1996. This schedule will allow for oral argument in this case as early as possible and will ensure a speedy resolution of the important issues the petitions for review present for implementing the Act.

The time for filing petitions for review of the FCC's order, which will expire on October 28, 1996, poses no impediment to the schedule Bell Atlantic and GTE propose. As the certificate of service attached to Bell Atlantic's motion to expedite indicates, that motion was served on all the parties to the FCC proceeding below. Thus, all parties who could petition for review before this Court are already on notice of the expedited schedule that has been proposed.

ARGUMENT

As shown below, GTE readily satisfies each of the factors justifying a stay of the Commission's order pending judicial review.[7]

I. GTE'S PETITION FOR REVIEW IS LIKELY TO SUCCEED ON THE MERITS.

The challenges outlined in this stay motion only touch the tip of the iceberg in terms of the issues that could be raised at the merits stage. Nevertheless, they are sufficient to establish beyond doubt that GTE is likely to succeed on the merits of its petition for review.

A. The FCC Lacks Authority Under the Act To Promulgate National Pricing Rules Governing Agreements Under Section 252 of the Act.

The FCC's attempt to set uniform national pricing terms is simply a brazen effort to grab power from state commissions by usurping the role Congress assigned to them.

1. The text and structure of the 1996 Act plainly assign authority over pricing to state commissions, not the FCC.

Congress expressly assigned state commissions, not the FCC, the power to determine prices in arbitrations under the Act. In terms that could not be clearer, § 252(c)(2) provides that "a State commission shall . . . establish any rates for interconnection, services, or network elements according to subsection (d)." (Emphasis added). Section 252(d)(1) provides the

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[7] A stay of an agency order pending judicial review should be granted where the applicant can show: (i) likelihood of success on the merits; (ii) irreparable harm absent a stay; (iii) the absence of harm to others if a stay is granted; and (iv) that the public interest favors a stay. See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Reserve Mining Co. v. United States, 498 F.2d 1073, 1076-77 (8th Cir. 1974). Cf. also Antoine v. United States, No. 95-2006 (8th Cir. Sept. 13, 1996) (stay of agency order was granted pending review). It is well settled that where the applicant can demonstrate a higher probability of success on the merits, the standard required for a showing of irreparable harm will be correspondingly reduced. See Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam) ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.").

substantive standard that States must apply, directing that "[d]eterminations by a State commission" of rates "shall be based on . . . cost" and "may include a reasonable profit." (Emphasis added). Similarly, § 252(d)(3), governing services, expressly provides that "a State commission shall determine wholesale rates." (Emphasis added). It blinks at reality to read the plain terms of these sections as doing anything other than assigning state commissions, not the FCC, the power to set prices in arbitrations.

If the explicit statutory text were not clear enough, the structure of the Act underscores the same assignment of authority to the States. Section 252(c)(1) provides that the substantive conditions imposed by state commissions in arbitrations must meet the requirements of both "section 251" and "the regulations prescribed by the [FCC] pursuant to section 251." Thus, § 252(c)(1) recognizes that to the extent the FCC has been given explicit authority to issue substantive regulations in § 251, state commissions must ensure compliance with those regulations. By contrast, the very next paragraph -- § 252(c)(2), which addresses pricing -- provides only that a state commission shall establish rates "according to subsection (d)," (emphasis added), with no mention of any FCC regulations. Subsection (d) of § 252 is the provision quoted above that sets the standards state commissions must apply in setting prices, and makes no reference whatsoever to the FCC. The contrast between § 252(c)(1) and § 252(c)(2) could not be plainer. When Congress wanted state commissions to follow the Commission's regulations (as in § 252(c)(1)), it said so explicitly. With respect to setting prices, by contrast, Congress expressly omitted any reference to FCC regulations.

The FCC purports to derive authority over pricing from § 251(d)(1), which simply directs the FCC to "complete all actions necessary to establish regulations to implement the requirements of this section" within six months of enactment. But the Commission's reliance on § 251(d)(1) is utterly misplaced. Section 251(d)(1) has nothing to do with granting the Commission authority to do anything. It merely sets a time limit for tasks the Commission is otherwise given under the Act. The section is a limitation on the Commission's authority -- requiring it to act within a certain time -- not a grant of authority. Moreover, to the extent § 251(d)(1) confirms the FCC's ability to issue regulations, it does so only with respect to tasks expressly assigned to the FCC by the Act. Thus, for example, § 251(e) expressly directs the FCC to "create or designate one or more impartial entities to administer telecommunications numbering." Similarly, § 251(d)(2) acknowledges some role for the FCC in determining which "network elements" must be unbundled. Merely because § 251(d)(1) recognizes a function for the FCC in such discrete matters does not mean the FCC is authorized to issue new rules on matters in which it was not given any role in the statute.

To the contrary, if anything, § 251(d) confirms that the FCC has no authority to determine prices. While it expressly articulates the substantive standards the FCC must apply in considering any rules pertaining to unbundling of network elements, § 251(d) makes no reference to standards governing pricing. Rather, the substantive standards Congress applied to pricing are found only in § 252(d)(1), which dictates the standards state commissions should apply in arbitrations. Thus, by both including substantive standards to govern any FCC rules on unbundling and omitting any standards for pricing, § 251(d) itself strongly confirms that Congress did not intend the FCC to have any role in setting prices.

2. Section 2(b) of the Communications Act confirms that the 1996 Act cannot be construed to give the FCC authority over pricing.

As the explicit text and structure of the Act outlined above make clear, the FCC's claim to authority over pricing rests on a wholly untenable reading of the Act. Indeed, since the Act explicitly assigns authority over pricing to state commissions, there is no silence or ambiguity in the statute that might entitle the FCC to claim deference for its interpretation under the principles of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The principle of Chevron deference offers the FCC no aid in this case for another, independent reason. Section 2(b) of the Communications Act of 1934 provides what the Supreme Court has described as "its own rule of statutory construction" with respect to the jurisdiction of the FCC to regulate intrastate communications services. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377 n.5 (1986). Section 2(b), in other words, operates as a counter-Chevron rule of construction when the FCC is determining the scope of its jurisdiction over intrastate communications. That rule puts a final nail in the coffin for the FCC's power grab over prices.

Section 2(b) provides that "nothing in this Chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b) (1994). This "congressional denial of power to the FCC" over prices and other matters concerning local telephone service can be overcome only if Congress includes "unambiguous" and "straightforward" language in the Act either modifying § 2(b) or expressly granting the FCC additional authority. See Louisiana Pub. Serv. Comm'n, 476 U.S. at 375, 377.

Obviously, neither exception to § 2(b) is present here. Whatever else might be said of § 251(d)(1), that section does not "unambiguous[ly]" and "straightforward[ly]" give the FCC the authority to set prices for interconnection, network elements and services. Similarly, no provision in the 1996 Act expressly modifies § 2(b) to grant the FCC authority to regulate either prices or other local matters under § 251. To the contrary, such a provision was expressly rejected by Congress, for while it was included in the Senate bill, it was not included in the law as enacted. See S. 652, 104th Cong., 1st Sess. § 101(c) (1995). Indeed, even the FCC concedes that no provision of the 1996 Act "contain[s] an explicit grant of intrastate authority to the [FCC]." First Report and Order ¶ 84.

The FCC's only response to the fatal limitations on its jurisdiction in § 2(b) is the assertion that because the 1996 Act purportedly "moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act," id. ¶ 24, the Commission's rulemaking powers under § 251 should "take precedence over any contrary implications" in § 2(b), id. ¶ 93. But that "reasoning" is plainly flawed at a number of levels.

As noted above, there is simply no grant of authority to the FCC over prices in § 251 to "take precedence" over the rule of § 2(b). In addition, the FCC has the relationship between § 2(b) and subsequent legislation such as the 1996 Act flatly backwards. The Supreme Court has made clear that § 2(b) deprives the FCC of jurisdiction over intrastate communications services unless a later act expressly modifies § 2(b) or expressly grants the FCC such power. See Louisiana Pub. Serv. Comm'n, supra. The FCC's general sense that the 1996 Act impliedly "moves beyond" the jurisdictional limitations in § 2(b) cannot overrule the explicit "congressional denial of power to the FCC" in § 2(b).

Moreover, the FCC's reading of § 251 to imply some basic change in the jurisdictional framework set forth in § 2(b) rests on a clear logical flaw. The FCC assumes that if § 251 applies to issues involving solely the local exchange, it must also necessarily imply a grant of jurisdiction to the FCC to regulate the same matters. See First Report and Order ¶ 93. But there is no basis for that logical leap. To the contrary, § 2(b) is phrased in the disjunctive -- it directs that nothing in the Act should be construed "to apply" or "to give the FCC jurisdiction with respect to" intrastate communications. While § 251 may apply by its terms to some matters